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OGC Has Reviewed

4 June 1956

File
Briefed LKW
9 June
JSM

MEMORANDUM FOR: Security Office

ATTENTION:

Mr. [REDACTED]

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SUBJECT:

Termination of Probationary Employees

1. Attached for your consideration is a copy of the opinion of Haynes v. Thomas decided in the United States Court of Appeals for the District of Columbia on 19 April 1956. The substance of this opinion is that the Government may not utilize its authority to terminate a probationary employee under the normal administrative authorities applicable to such employees when, in fact, the case is a security case. When it is a security case, the Court held that the procedures provided by Public Law 733 (5 U. S. C. 22-1) must be followed. This law was extended to all agencies and departments of the Government by Executive Order 10450.

2. In connection with termination of probationary employees, i. e., those who have not satisfactorily served one full year, the Government generally and CIA are authorized by proper personnel action to terminate an employee based on a determination that he is not satisfactorily performing the job. There is no appeal from such action and the decision of the proper personnel officer is final. In fact, in such cases the Government is not obligated by statute to furnish any explanatory notice to the employee.

3. Public Law 733 authorizes the Agency head "in his absolute discretion and when deemed necessary in the interest of national security" to suspend, without pay, "any civilian officer or employee." There are several provisos, however. The first in effect states that to the extent the Agency head determines that the interests of the national security permit, the employee shall be notified of the reasons for his suspension and within thirty days the employee may submit statements to show why he should be reinstated. Thereafter the Agency

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By: *BT*

head may, after reviewing the case, terminate the employment of the individual. The second proviso relates to persons who have completed their probationary period and provides for additional procedural safeguards such as the written statement of charges and a hearing before a 10450 Board. The statute also specifically states that the decision of the Agency head is conclusive and final. In this connection the Court stated in Haynes v. Thomas: "We have said repeatedly that Courts will not review the action of executive officials in dismissing executive employees except to insure compliance with statutory requirements."

4. In Haynes v. Thomas, Haynes, the employee, had not completed his probationary period and he was informed by letter that derogatory information had been received which raised a question concerning his continued employment in connection with the Government's security program. After an interview with Haynes, a personnel action was signed terminating the employee "during trial period." The notice of personnel action further indicated that the separation was based on the Executive Order 10450 program. The procedural requirements of P. L. 733 were not followed in this case. Since he was a probationary employee all that was required was that he be notified of the reasons for suspension and be permitted an opportunity to submit statement or affidavits to show why he should be reinstated. The Court then held that he was wrongfully discharged and should be reinstated. The Court further pointed out that when he has been reinstated the Government could then suspend him again and follow the procedure in the statute.

5. Your office has previously raised the question in certain cases of probationary employees who were entered on duty prior to completion of final investigation. It had been considered that in those cases where the results of the investigation were such that the employee should not receive a security clearance, he would be terminated by personnel action and within the procedures applicable to administrative terminations since he had no appeal rights as a probationary employee. In view of the decision in Haynes v. Thomas, it is our view that if the Agency were to follow such a procedure the aggrieved employee could successfully appeal to the Courts for reinstatement under the doctrine of Haynes v. Thomas.

6. We are left then with two alternatives in handling the cases described. We can utilize Public Law 733 and Executive Order 10450 issued under that law or we could utilize the authority available to the Director of Central Intelligence under section 102(c) of the National Security Act. In either event action by the Director would be required, whereas under the previously considered method action could have been taken in the Personnel Office. However, you will note that under the 10450 program, there is no requirement for a Board and we would see no reason why a Board should be established if 102(c) were to be used. In utilizing the 10450 approach, you will note that there is only one simple procedural step required by law and that is a notification of the reasons for the suspension to the extent that the interests of national security permit, with subsequent opportunity within thirty days for the employee to submit statements. In 10450 cases a suspension is mandatory prior to final termination and such action appears appropriate for the types of cases being considered. Thereafter the determination of the Director of Central Intelligence is conclusive and final. It is suggested that if 102(c) were used that the procedural requirement under 10450 be followed since it would appear to cause no great burden and in this circumstance suspension would be a matter of discretion with the Agency.

7. As a final thought, we suggest that the 10450 approach may have considerable merit in that under the security program within the Agency, as we understand it, the Civil Service Commission records will show that in every case which they have forwarded to us for processing under 10450, there has been a clearance except for some cases of resignations pending final action. [REDACTED]

[REDACTED] Therefore, since the procedural requirements under the 10450 program for probationary employees are not burdensome and if the Agency believes the employee should be terminated, there may be a useful purpose served by handling such cases under 10450 to balance the ledger in the Civil Service records.

[REDACTED]
Deputy General Counsel

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Attachment

✓ cc: DD/S
Personnel

OGC/JSW:mks (1 June 1956)

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